

January 5, 2022

The Honorable Patty Murray
Chair
Committee on Health, Education,
Labor, and Pensions Labor, and Pensions
U.S. Senate
Washington, D.C. 20510

The Honorable Richard Burr
Ranking Member
Committee on Health, Education
Labor, and Pensions Labor, and Pensions
U.S. Senate
Washington, D.C. 20510

Re: Renomination of David Weil to Be Administrator of the Wage and Hour Division

Dear Chair Murray and Ranking Member Burr:

On behalf of the undersigned organizations, we write you to state our strong opposition to the nomination of David Weil to be Administrator of the Wage and Hour Division (WHD) at the U.S. Department of Labor (DOL). Although the Senate chose not to confirm Mr. Weil in the First Session of the 117th Congress, President Biden recently renominated him for this critical role. Based on his previous service at DOL, and his track record of bias against the regulated community, particularly the smallest employers in America, we remain concerned that Dr. Weil would again implement policies at DOL that are unbalanced and would harm workers and small businesses, in particular women and minority-owned businesses that employ millions of Americans. For these reasons, we urge the Committee and full Senate to again reject Dr. Weil's nomination.

We respectfully submit our concerns with Dr. Weil's agenda, including:

Open Bias Against Small Businesses. Dr. Weil has an extensive track record of hostility towards specific business models, industries, and companies that employ millions of Americans in every state. In his 2014 book "The Fissured Workplace," as well as numerous academic writings, and public forums in coordination with labor unions, Dr. Weil has expanded on his ideology and belief that DOL should take an aggressive and activist approach to enforcement, particularly against lead enterprises that do business with smaller firms. During his time in the Obama Administration, this worldview resulted in several harmful actions that are outlined in this letter. Dr. Weil's ideology is a cause for great concern for small employers, who are often the contractors and franchisees against whom Weil has telegraphed his intended enforcement.

Unlawful 2016 Overtime Rule. During his tenure as Administrator, Dr. Weil was the architect of DOL's revised white collar overtime rule, which would have more than doubled the minimum salary level for exempt employees from \$455 per week (\$23,660 annually) to \$913 per week (\$47,476 annually), an unprecedented expansion of Fair Labor Standards Act (FLSA)'s overtime coverage. In a successful legal challenge to the rule, the U.S. District Court for the Eastern District of Texas characterized the increased overtime threshold as a "drastic" change that would extend FLSA mandates to 4.2 million employees from the exemption even though they performed exempt job duties. The court ultimately concluded that DOL unlawfully and impermissibly exceeded its rule-making authority by promulgating these regulations and enjoined them on a nationwide basis. The Obama overtime rule would have been a massive burden on employers, and we are concerned that Dr. Weil will pursue an aggressive revision to

overtime rules that will harm small businesses as our economy works to recover from the COVID-19 pandemic.

Restrictive Independent Contractor Status Policy. In 2015, Dr. Weil issued an Administrator's Interpretation (AI) under the FLSA, in which DOL adopted an unreasonably strict standard for "independent contractor" classification, rejecting decades of case law emphasizing "control" over an individual's work, and focusing instead on "economic dependency" in a manner that would effectively eliminate the use of independent contractors across a range of business models. Indeed, the standard adopted in this AI was premised on Weil's well-publicized view that most workers should be classified as statutory employees under the FLSA, and would have eliminated the preferred model of work for countless individuals who choose to work as independent contractors to control their own schedule, work flow, income, and independence. Notably, this move to dramatically limit the ability of workers to operate as independent contractors almost exactly squares with the abolition of independent contracting sought by organized labor in H.R.842/S.420, the *Protecting the Right to Organize Act* or "PRO Act," which would adopt a draconian "ABC test" for determining independent contractor status, and as a practical matter, destroy the business model and disrupt the livelihoods of millions of Americans.

Unprecedented Expansion of Joint Employment. In 2016, Dr. Weil issued another AI which dramatically expanded joint-and-several liability for "joint employers" under the FLSA. This change broadened the definition of "joint employer" to include employers who exercised only indirect control of the employees, for example, in a staffing arrangement where the so-called joint employer did not control work rules, hours, or wages of the staffing company's workers. Particularly significant and onerous, the AI would have made national franchisors "joint employers" of their franchisees' employees, even where franchisor has little to no direct control over terms and conditions of these workers' employment. Again, the theories of joint employment Dr. Weil has espoused mirror the disastrous PRO Act, which would seek to impose liability on a wide range of employers for unfair labor practices in which they played no role.

Between 2016-2018, Mr. Weil's unilateral broader standard of joint employment cost franchise businesses an additional \$33.3 billion per year in operational and legal costs, resulted in 376,000 lost job opportunities, and led to a 93% increase in lawsuits. Had it not been withdrawn by the previous Administration, this AI would have sacrificed more jobs and increased frivolous litigation. Given Dr. Weil's open hostility to certain small businesses, we are concerned he will again seek a harmful joint employer standard that will reduce job and entrepreneurial opportunities for many Americans.

The undersigned organizations believe that Dr. Weil will, if confirmed again, once more use the power of the DOL beyond Congressional intent to enact policies that will harm workers and small businesses during the economic recovery. We believe that a thorough and fair review of Dr. Weil's record illustrates that he is unfit to lead the WHD in the impartial manner that is critical to both enforce federal law and encourage economic growth during the post-pandemic recovery.

Thus, we urge Committee members to reject Dr. Weil's nomination. Thank you for considering these views.

Respectfully,

Associated Builders and Contractors
Coalition of Franchisee Associations
Franchise Business Services
Job Creators Network
Independent Electrical Contractors
International Franchise Association
International Warehouse Logistics Association
National Association of Home Builders
National Association of Wholesaler-Distributors
National Franchisee Association
National Restaurant Association
Small Business & Entrepreneurship Council
TechNet
Truck Renting and Leasing Association

CC: Members of the U.S. Senate Committee on Health, Education, Labor, and Pensions
U.S. Senate Majority Leader Charles Schumer
U.S. Senate Republican Leader Mitch McConnell